Civil Rules Advisory Committee Meeting

October 7, 2011

Present: Justice Warren Jones, Judge Deborah Bail, Judge Earl Blower, Judge John Stegner, Jennifer Brizee, Patrick Brown, Neil McFeeley, Clay Gill, William Gigray III, Rob Anderson, Breck Seiniger, and Cathy Derden. Keely Duke participated by phone for the morning session. Guests: Judge Barry Wood and Taunya Jones.

Time standards. Judge Wood and Taunya Jones met with the committee as part of their role in reviewing case flow management and processing in all Idaho trial courts. Judge Wood discussed the standards set out in I.C.A.R. 57 and the model time standards for state courts, noting there is a national effort to look at this issue. The purpose of the review is to increase efficiency by attempting to identify and address areas of unnecessary delay in the system. This may involve changes in the reporting and tracking of cases, as well as a discussion of how to best capture information at intermediate points in a case so as to identify the reason for a delay. Currently our standard only reflects the time between filing and disposition. Judge Wood asked for feedback on several points, such as whether there should be more case types for tracking and whether there should be intermediate time standards for different benchmarks in the case. The members were also asked to identify any practices, rules or statutes regarding time frames that might be causing unnecessary delay.

There was consensus that the time standard should not begin until a responsive pleading is filed rather than when the complaint is filed as it may be several months before the complaint is served and no action is taken until then. There was also consensus that there should be more case types with at least some way to separate complex cases, such as medical malpractice, products liability or cases with multiple defendants, from a single issue case with one defendant. This would give a truer picture of how cases are proceeding through the courts. Different standards could be used for the complex cases or multiple benchmarks could be used, such as 75% of cases within a certain time frame and 90% in another. It might also be helpful to separate cases where there is a default.

The members discussed whether there should be an earlier date certain set for dispositive motions. Currently summary judgment motions have to be filed 60 days before trial and some believed this was too close to trial as it has an effect on final trial decisions and can cause complications with scheduling experts. There is also a problem with getting a hearing date for summary judgment motions and it was suggested that judges regularly calendar slots for these motions. There was also discussion as to whether 180 days before a case was eligible for dismissal for inactivity was too long.

There was also discussion about when trial dates should be set and there was general consensus that delaying the setting of trials 60 days after dispositive motions was not workable because of the impact on litigants who require the use of experts and who are either not able to schedule an expert with such short notice or not without their clients having to pay an enormous premium or are required to present the testimony in a less effective manner. The practicing attorneys on the committee expressed concern about the idea and did not favor it.

Members were invited to send any additional rules or statutes to be reviewed and any other problems perceived to Judge Wood, Taunya Jones or Cathy Derden.

Proposed rule on limited representation. The Committee considered a proposal to add new subsections to Rule 11 on limited representation and limited appearance. The proposed rule on limited representation would allow an attorney to assist a pro se litigant in drafting pleadings without actually appearing on behalf of the pro se person. The fact that the attorney helped with the drafting would have to be disclosed in a statement and in doing so the attorney would be certifying that to the best of his or her knowledge and belief the pleading was well grounded and based on a reasonable inquiry of the pro se party. The rule also states that the attorney may rely on the pro se party's representation of the facts unless there is reason to believe it is false or materially insufficient. The proposed rule on limited appearance would allow an attorney to assist a pro se litigant with a discrete court proceeding and then after that proceeding withdraw by simply filing a notice of completion without having to go through the usual attorney withdrawal process. The suggestion was that attorneys might be willing to do more pro bono work if they could help with one dispositive motion or one aspect of the case without then being obligated on that entire case unless they can show good cause to withdraw.

The Committee was the most concerned with the proposal regarding limited appearance. There was discussion as to whether a rule was needed for an attorney to help simply with preparing or reviewing a pleading and some stated they would be less likely to help prepare a pleading under this rule. As for limited representation, concerns were raised as to service and as to whether attorneys could get in and out of cases if they wanted to do one issue and then later appear on another issue. It was also noted that there was nothing in the rule that limited it to pro bono work if that was the intent. The Committee believed that Brad Andrews, as bar counsel, needed to be involved in consideration of such a rule and whether it complied with the ethical rules. The Committee also wanted input from Mary Hobson, Legal Director of the Idaho Volunteer Lawyers Program. The Committee voted to table the issue until their input could be obtained.

Rule 40(d)(1). Disqualification without cause. The Committee was asked to consider whether the same provision on misuse of the rule that was added to Criminal Rule 25 should be added to this rule. The provision states that if it appears that an attorney or law firm is using disqualifications without cause for such purposes, or with such frequency as to impede the administration of justice, the Trial Court Administrator shall notify the Administrative Director of the Courts requesting a review of the possible misuse of disqualifications without cause. The Administrative Director shall review the possible misuse of this Rule and may take remedial measures. The Administrative Director, before or after taking such remedial measures, may refer the matter to the Chief Justice, who, upon determining that there has been misuse of disqualifications without cause, may take appropriate action to address the misuse, which may include an order providing that the attorney or firm that has engaged in such misuse is prohibited from using disqualifications without cause for such period of time as is set forth in the order or until further order of the Chief Justice.

The Committee was concerned that the proposed rule contains no standard as to frequency of use or just how many times would subject an attorney to an inquiry. It was noted that if an attorney has a reason for disqualifying a judge then he or she is likely to disqualify that judge every time.

There may be a good reason for the motion. In addition, in some cases the attorney may believe there is cause to disqualify a judge but would prefer to file a motion without cause so that it does not have to be discussed and so that there is no chance it will be denied. In addition, the proposed rule was thought unnecessary as the current rule already states it is not to be used to obstruct, hinder or delay and there is nothing to prevent an investigation now at the request of the TCA if it appears the rule is being abused. The Committee voted to leave the rule as is and not to add this provision.

Rule 60 (c). Proceedings to modify child custody or child support orders. This rule states that these motions shall be served and adjudicated in substantially the same manner as an original proceeding and this has raised several questions. One of these is whether this is a new proceeding for purposes of a motion to disqualify a judge without cause and the proposal was to amend rule 40(d)(1) to clarify that such a motion could not be made with regard to these proceedings. The Committee opined the same judge who entered the original decree or support order should preside over any modification and that allowing a disqualification would be an obvious opportunity for judge shopping. A motion to disqualify without cause should not be allowed unless the judge who originally entered the order is retired or deceased and a new judge is assigned to the case. The Committee voted in favor of recommending the rule be amended as follows:

(I) Exceptions. Notwithstanding the above provisions, the right to disqualification without cause shall not apply to:

(i) A judge when acting in an appellate capacity from another court, unless the appeal is a trial de novo;

(ii) A judge in a post-conviction proceeding, when that proceeding has been assigned to the judge who entered the judgment of conviction or sentence being challenged by the post-conviction proceeding;

(iii) A judge who has been appointed by the Supreme Court to preside over a specific civil action;

(iv). A judge hearing petitions to modify child custody orders or child support orders entered by that same judge in an earlier proceeding.

Another issue involving Rule 60(c) and the statement that these motions to modify shall be served and adjudicated in substantially the same manner as an original proceeding involves venue. In many cases the defendant has moved to another county when the motion to modify is filed. I.C. § 5-404 states that venue is determined by residence and provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action." The question is whether this statute applies to motions to modify and whether they should be treated as original proceedings for purposes of venue or be filed in the county where the original decree was entered. A proposal was made to make it clear that these proceedings were not original proceedings for purposes of this statute on venue. It was noted that a motion for change of venue could always be filed under I.R.C.P. 40 (e) and granted

on the basis that convenience of witnesses and the ends of justice would be promoted by the change. The Committee voted to recommend the following amendment to Rule 60(c):

Except as otherwise provided by these rules, ~~A~~ a motion to modify child custody or child support orders shall be served and adjudicated in substantially the same manner as an original proceeding, but the filing of a motion to modify child custody or child support orders shall not be deemed the commencement of an action under Idaho Code Section 5-404. The motion shall be in a form similar to a complaint, served with a notice directing the opposing party to file a written response within twenty (20) days, or default may be entered, with or without hearing. The judge, in the judge's discretion, may require a hearing. The method of service and return thereon shall be the same as for a summons.

Service of Rule 60(c) motion. This rule provides that the method of service is the same as a summons, which means personal service is required. The Committee received a letter questioning why personal service was necessary and requesting consideration of allowing service in the same manner as any other motion filed in a pending case. The distinction is that these cases are not usually pending and the motions can be filed years after the decree is entered. The attorney that was of record may no longer have any contact with the parties. The parties need personal service so that they are aware of the motion. In addition, the case is starting over in the sense that a hearing is usually required. No change in the rule was recommended.

Family law rules. The Civil Rules Committee voted in favor of supporting a separate set of rules dedicated to family law cases. The Committee noted that there are a number of civil rules dedicated solely to family law issues that require review by a separate committee with expertise in that area.

Rule 45(b)(2). Subpoenas. This section of Rule 45 addresses a subpoena to command a person who is not a party to produce or to permit inspection and copying of documents and provides that the party serving the subpoena shall serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party. The seven day provision was added to address situations where attorneys were submitting subpoenas to non-parties without providing a copy to the opposing counsel, thereby precluding any kind of review or objection by the opposing counsel until after potentially privileged documents had been produced by the non-party, per the subpoena. However, the rule provides that the subpoena may be served on the non-party "at any time after commencement of the action", and Rule 3(a) provides that an action "commences" once the complaint is filed. Thus, a plaintiff can serve a subpoena before even serving the complaint since the complaint only has to be "filed" and the action is deemed to have commenced. The problem is that the summons and complaint rarely get to defense counsel within seven days and thus the chance for a meaningful review and objection by counsel is still lost. Many non-parties who receive a subpoena readily provide the information so as to avoid a deposition. The proposal was to amend the rule to state a subpoena can be served any time after the defendant has appeared in the action, or filed a responsive pleading.

One problem noted with the proposal was that there could be several defendants in the action and you would have to wait for all parties to appear or default until you could issue the subpoena. Though some defendants may be hard to locate they can be served by publication. A majority of the committee was in favor of an amendment, but wanted to add in language "unless otherwise

ordered by the court" so that the parties could seek permission to issue a subpoena without waiting for all parties to be served. A majority of the committee voted in favor of recommending the following amendment:

(2) A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents, electronically stored information, or tangible things, or to permit inspection of premises may be served at any time ~~after commencement of the action~~ after all parties have either appeared or have been defaulted, unless otherwise ordered. ~~Unless otherwise specified by the court, t~~The party serving the subpoena shall serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party, unless otherwise specified by the court. The party serving the subpoenas shall pay the reasonable cost of producing or copying the documents, electronically stored information or tangible things. Upon the request of any other party and the payment of reasonable costs, the party serving the subpoena shall provide to the requesting party copies of all documents obtained in response to the subpoena.

Rule 45 (e)(2) Service of subpoena. The Committee considered a proposal to amend this rule to allow service of a subpoena on a party to a legal action for attendance at a trial or hearing to be made by service on that party's attorney. This would avoid the time and expense of serving a subpoena on an opposing party residing in Idaho, and avoid the time and expense of trying to obtain service on someone who is avoiding service. It was noted that many motions and orders, including those that can result in significant consequences or sanctions, are now served on a party by service on the attorney for that party. The Committee voted in favor of recommending the following amendment to the rule as a new provision at the end of the rule.

Service of a subpoena upon a party to a legal proceeding can be made by service on the attorney of record for that party in such legal action or proceeding as provided in Rule 5(b) for attendance at a hearing or trial with or without the production of documents or other objects. No prepayment tender of fees and mileage shall be necessary to that party, but the court in its discretion may, upon a hearing held thereon at any time after service on that party's attorney, determine under all of the circumstances then existing, the reasonable amount of such fees and mileage to be paid, if any, to that party.

Rule 75. Contempt. When a child support obligor fails to pay child support as ordered, an aggrieved party, often the Department of Health and Welfare, may file a motion and affidavit for contempt under Rule 75 in connection with the pending child support case. After the aggrieved party serves the obligor with an order to appear, the obligor sometimes fails to appear as ordered, and the court issues an arrest warrant to bring the obligor before the court to answer the contempt charges. If the disobedient obligor has moved out of the county, the sheriff's office will incur substantial costs (in the range of $1,000 to $2,500) to transport the respondent from his home county to the county where the contempt action is pending. As it turns out, sheriffs have limited budgets and are not very keen to spend that kind of money; accordingly, the obligor who moves out of county may escape punishment for contempt. To address this situation it was proposed that the rule be amended to establish a procedure that would allow an aggrieved party to commence contempt proceedings in the county of the respondent's residence instead of in the county where the underlying action (child support suit) is pending. The objective is to allow the

contempt to take place in the county of the defendant's residence without moving the entire underlying case to that county.

Many felt this was an administrative issue with the sheriff's office rather than a problem with the rule. The issue was tabled to allow more consideration or different language to be proposed.

Contempt and bond. The Committee received an email noting that while the criminal rules prohibit the setting of different amounts of bail for different types of bond in criminal cases there was no such provision in Rule 75(e) (2) regarding bail when a warrant of attachment was issued. The issue was tabled in light of an effort to get a constitutional amendment to allow cash only bonds.

Mental commitment hearings and video hearings. The criminal rules were recently amended to allow for the presentation of forensic testimony by video teleconference. The Committee received a request to consider a similar rule for mental commitment proceedings to allow the person to be examined by video teleconference by the designated examiner. It was supported by a letter from Alfred Barrus, the Prosecuting Attorney in Cassia County. There was also a letter from Adrian Dean, a Consulting Psychiatrist and the Senior Designated Examiner in Region 5 Mental Health. Dr. Dean wrote about success of the Tele-Health program that allows him to examine patients in prison without traveling to the prison. He stated that he had worked with the Twin Falls County Commissioners and the Twin Falls Criminal Justice Facility to set up Tele-Health from his office to the jail to provide services. He also does this for Gooding County and he stated it worked well. He noted that even though it saved money, time, transportation and manpower costs, the freedom of choice to use face to face examinations for any specific circumstances remains with judges, prosecutors and law enforcement.

The Committee was in favor of providing for this type of examination and discussed providing for commitment proceedings to be done via video teleconference so that the patient did not have to be transported to the courthouse. It was questioned whether this should be a court rule or an IDAPA rule. The Committee wanted to see specific language and as soon as that is available it will be circulated to the Committee.

Rule 35. Physical and mental examination of persons. Several years ago this rule was amended to allow the person being examined to have a representative in the examination room. The Committee received a request to reconsider this amendment with the argument being there were already few doctors willing to do this type of exam and that this rule has limited it even more. The Committee recognized that it is difficult to find doctors in general that are willing to get involved in the legal system and to do these exams but also recognized that the basic purpose of the exam is the collection of evidence. The doctor will testify as an expert, has great influence on the jury and is paid by one party. Yet, the doctor may be the only expert whose exam is not videotaped where everyone can see and this was the reason for allowing a representative. No change in the rule was recommended.

Rule 16 (j). Mediation of child custody and visitation disputes. Rule 16(j)(9)(B) states: "Attorneys are excluded from mediation conferences unless their presence is requested by the mediator or ordered by the court. Other interested persons may participate in the mediation upon consent of both parties." Thus, the rule specifies that the mediator determines if the parties' attorneys can participate in the mediation. I.C. § 810 provides "Unless otherwise provided by

court rule or order, an attorney or other individual designated by a party may accompany the party to and participate in a mediation. …" There was a proposal to amend 16(j) to allow the parties to decide if they want their attorney to be present, or, in the alternative, to provide that the mediator in consultation with the parties decide.

The Committee members were reluctant to amend this rule without knowing the rationale behind placing the decision with the mediator as there may have been a specific reason for doing so. This rule did not originate with the Civil Rules Committee and the Committee believed a family law based committee such as the Children and Families in the Court Committee that has more expertise in family law matters would be the more appropriate committee to review this proposal.

Admissions. There is no limit on the number of requests for admissions as there is for interrogatories and the Committee discussed whether there should be. Requests for admissions serve a good purpose and can eliminate issues for trial and the need for discovery. Any number limit would be arbitrary and a party can go to the court and seek relief in the form of a protective order if the request is unduly burdensome. It was not seen as a widespread problem and it was determined that no change be made in the rules.

Reply Brief. It was pointed out that there might be a discrepancy between the Civil Rules and the Fourth District Rules as to the filing of a reply brief. I.R.C.P. 7(b) (3(e) states the reply must be *received* by the parties at least two days before the hearing. The Fourth District Rules say the reply must be *filed* at least three days before the hearing. Not everyone saw this as a conflict and no action was taken.

Fees. The Committee also reviewed a request to reconsider the concept of billable hours and consider value based fees as an alternative, especially as it related to Rule 54 and award of fees. However the members noted that the court can still decide what a reasonable fee is for services even with billable hours.